FACULTY OF LAW

DEPARTMENT EUROPEAN, PUBLIC & INTERNATIONAL LAW
CENTRE FOR ENVIRONMENTAL & ENERGY LAW

"STANDING": WHO CAN SUE TO PROTECT CLEAN AIR ?

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1. THE GOOD STORY

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CJEU, 25 July 2008, C-237/07, *Janecek*

1. Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, […] must be interpreted as meaning that, *where there is a risk that the limit values or alert thresholds may be exceeded*, ***persons directly concerned*** must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution [***if necessary by bringing an action before the competent courts]*** (pt. 39)

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2. The Member States are *obliged*, ***subject to judicial review by the national courts***, only to take such measures – in the context of an action plan and in the short term – as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.

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CJEU, 19 November 2014, C-404/13, *ClientEarth*

[…]
3. Where a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive, *it is for the national court having jurisdiction,* should a case be brought before it, ***to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms***, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter.

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Other relevant case law – art. 9 (2) Aarhus Convention – project decisions

- CJEU, 15 October 2009, C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening:*
  - Environmental protection associations ~~"which have at least 2 000 members"~~

- CJEU, 12 May 2011, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen:*
  - Non-governmental organisations promoting environmental protection … "~~on the ground that that rule protects only the interests of the general public and not the interests of individuals~~"

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- CJEU, 18 October 2011, C-128/09 e.a., *Boxus*
  - Verification of the legislative process in case a project is adopted by a specific legislative act by a court of law

- CJEU , 16 February 2012, C-182/10, *M.- N. Solvay and Others*
  - Idem

- CJEU, 7 November 2013, C-72/12, *Gemeinde Altrip*
  - Judicial review not limited to cases in which no EIA was carried out, should include review of irregularity of EIA's
  - Burden of proof that procedural defect had no effect on the content of the decision may not be shifted to the public concerned, and no serious violation of a guarantee allowed

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- CJEU, 15 October 2015, C-72/12, *Commission/Germany*
  - Restriction of annulment of decisions to certain grounds (absence of EIA, absence of pre-assessment, causal link has been proven between procedural defect and outcome of the decision) not allowed
  - Scope of review limited to objections already raised within administrative procedure not allowed
  - Limiting access to justice of ENGO's to legal provisions conferring individual public-law rights not allowed
- CJEU, 16 April 2015, C-570/13, *Gruber*
  - Neighbours should be able to bring actions against decisions not to submit a project to EIA

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Other relevant case law – Art. 9 (3) Aarhus Convention – Acts and omissions

- CJEU, 8 March 2011, C-240/09, *Lesoochranárske zoskupenie VLK:*
  - No direct effect, interpretation of standing rules to the fullest extend possible according the objectives of Art. 9 (3) in order to enable ENGO's to challenge decisions violating EU environmental Law

- CJEU, 12 May 2011, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen:*
  - Non-governmental organisations promoting environmental protection may not be excluded "on the ground that that rule protects only the interests of the general public and not the interests of individuals"

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Other relevant case law – Art. 9 (4) Aarhus Convention

- CJEU, 16 February 2012, C-182/10, *M.- N. Solvay and Others*
  - Implementation Guide of Aarhus Convention can be taken into consideration

- CJEU, 15 January 2013, C-416/10, *Križan* and Others
  - Right of members of the public to ask for interim measures
  - Such a judicial decision in itself is not constituting an unjustified interference with the developer's right to property

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- CJEU, 11 April 2013, C-260/11*, Edwards en Pallikaropoulos*
  - ➢ Judicial proceedings should not be prohibitively expensive (capping costs, taking private and public interest into consideration, objective analysis)

- ➢ CJEU, 13 February 2014, C-430/11, *Commission/UK*
  - ➢ Idem

- ➢ CJEU, 8 November 2016, C-243/15, *Lesoochranárske zoskupenie VLK*
  - ➢ the right to effective judicial protection, in conditions ensuring wide access to justice, of the rights which an environmental organization derives from EU law, precludes that the decision on standing is postponed (an thus access to effective justice is denied) as soon the contested permit is granted

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2. THE PROBLEMATIC STORY

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Case T-396/09 and Joined Cases C-401/12 P to C-403/12 P

FACTS

- *15 July 2008*: The Kingdom of the Netherlands notified the European Commission on the basis of Art. 22 Directive 2008/50/EC on ambient air quality and cleaner air for Europe intention to postpone (max. 5 years) in 9 zones the attainment deadline (1 January 2010) for annual limit value of nitrogen dioxide (40 µg/m^3) and availing itself an exemption (max. till 10 June 2011) of applying daily (50 µg/m^3) and annual (40 µg/m^3) limit values of particular matter (PM_{10}) which were already in force since 1 January 2005

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- *7 April 2009*: Commission Decision C(2009)2560final – No objections
- *18 May 2009*: *Vereniging Milieudefensie* and *Stichting Stop Luchtverontreiniging Utrecht* request the Commission to internal review that decision under Art. 10 (1) of Regulation (EC) N°1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies – The Netherlands do not respect Art. 22 of the Directive
- *28 July 2009*: Commission Decision C(2009) 6121- Rejection of internal review – Only possible for measures of individual scope taken under environmental law, having legally binding and external effects

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- *6 October 2009*: both ENGO's introduce an application for annulment with the General Court of the EU
- *17 December 2009*: action for interim relief dismissed by the President of the GC as manifestly inadmissible (Case T-396/09 R, 17 December 2009, *Vereniging Milieudefensie* and *Stichting stop Luchtverontreiniging Utrecht)*
- *14 June 2012*: Judgement on the merits (Case T-396/09, 14 June 2012, *Vereniging Milieudefensie* and *Stichting stop Luchtverontreiniging Utrecht)*
  - Derogation is not an individual act
  - Art. 10(1) of Regulation 137/2006 read in conjuntion wit Art. 2(1)g of that Regulation is illegal because violating art. 9 (3) of the Aarhus Convention
  - Annulment of Commission Decision C(2009) 6121 (rejection of internal review)

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- *24-27 August 2012*: Council of the EU, EP en European Commission appeal the GC judgment with the CJEU
- CJEU (Grand Chamber), Joined Cases C-401/12 P to C-403/12 P, 13 January 2015, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*
  - International agreements prevail over acts of EU institutions
  - CJEU has to decide on the legal effects of such agreements in the EU legal order
  - Annulment of secondary law only on the basis of provisions having direct effect
  - Art. 9(3) Aarhus Convention is not an unconditional and sufficient precise obligation

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- Treaty consistent interpretation not a solution
- Art. 9 (3) Aarhus Convention is mainly a matter of MS law
- GC judgement is set aside

Similar cases:

- General Court, Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action* Network Europe v Commission, 14 June 2012
- CJEU, Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, 13 January 2015

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- Aarhus Convention Compliance Committee
  - **Findings and Recommendations ACCC/C/2008/32 (Part I), 14 April 2011**
    - Plaumann test (1963) and environmental cases

    '*Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*'

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"92. The Committee has concluded in paragraph 87 that the established jurisprudence of the EU Courts prevents access to judicial review procedures of acts and omissions by EU institutions, when acting as public authorities. This jurisprudence also implies that there is no effective remedy when such acts and omissions are challenged. Thus, the Committee is convinced that if the jurisprudence of the EU Courts examined in paragraphs 76-88 were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would also fail to comply with article 9, paragraph 4, of the Convention (cf. ACCC/C/2005/11 (Belgium) ECE/MP.PP/C.1/2006/4/Add.2, para. 40)).

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"94. With regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention."

"97.While the Committee is not convinced that the Party concerned fails to comply with the Convention, given the evidence before it, it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention."

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"98. Therefore, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends the Party concerned that all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters."

- **Findings and Recommendations ACCC/C/2008/32 (Part II) 17 March 2017**

"81. Having considered the main jurisprudence of the EU Courts since Part I, the Committee finds that there has been no new direction in the jurisprudence of the EU Courts that will ensure compliance with article 9, paragraph 3 and consequentially, article 9, paragraph 4 of the Convention."

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"83. The Committee regrets that despite its finding with respect to the national courts, the CJEU does not consider itself bound by this principle. The Committee considers that if the EU Courts had been bound in the same way as the national courts, the EU might have moved towards compliance with article 9, paragraph 3, and consequently article 9, paragraph 4."

"121. To conclude, an examination of the communicant's main complaints about the Aarhus Regulation leads to the following conclusion: the Regulation does not correct or compensate for the failings in the EU jurisprudence, and leaves the Party concerned in non-compliance with article 9, paragraphs 3 and 4 of the Convention."

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"123. Accordingly, the Committee finds that the Party concerned fails to comply with article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs"

Conclusion: the CJEU should review its *Plaumann* approach on standing in environmental cases and interpret Art. 263 (4) TFEU to the fullest extend possible in the light of Art. 9(3) – 9 (5) of the Aarhus Convention

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